No. 91-1010

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,

Petitioner,

v.

METCALF & EDDY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Is a district court's denial of a claim of Eleventh Amendment immunity from suit in federal court immediately appealable under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

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OPINIONS BELOW

The decision of the Court of Appeals for the First Circuit being reviewed is reported as *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10 (1st Cir. 1991). This decision is reprinted in Pet. App. A1-A8.

The order of the United States District Court for the District of Puerto Rico (Pieras, J.) denying the Petitioner's claim to Eleventh Amendment immunity from suit in federal court is not reported. It is reprinted in Pet. App. A9-A10.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1991. The Petitioner filed a timely Petition for Writ of Certiorari on December 23, 1991. This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

P.R. Laws Ann. tit. 22, § 142. Creation and composition of the Authority.

There is hereby created a public corporation and an autonomous government instrumentality of the Commonwealth of Puerto Rico by the name of "Puerto Rico Aqueduct and Sewer Authority", said corporation being referred to herein as the "Authority".

The exercise by the Authority of the powers conferred by sections 141-161 of this title shall be deemed and held to be an essential government function.

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STATEMENT OF THE CASE

This is a diversity action brought in federal court against Petitioner, a government instrumentality of the Commonwealth of Puerto Rico. The district court rejected Petitioner's claim of Eleventh Amendment immunity from suit in federal court and refused to dismiss the action. The court of appeals held that the order denying the claim of immunity was not immediately appealable, thus allowing the case to proceed with discovery and trial.

The question presented to this Court is whether the courts of appeals have interlocutory appellate jurisdiction to vindicate the States' constitutional right not to be subject to the judicial authority of the federal courts.

A. Relationship of the Authority to the Commonwealth.

The Puerto Rico Aqueduct and Sewer Authority (the "Authority"), a public corporation, was created by the Commonwealth of Puerto Rico as an "autonomous government instrumentality of the Commonwealth of Puerto Rico." P.R. Laws Ann. tit. 22, § 142. The Commonwealth delegated to the Authority the responsibility for delivering drinking water and treating wastewater throughout the Commonwealth of Puerto Rico — services which historically have been performed by the state in Puerto Rico, not by municipalities. *Id.* § 144.[1] Accordingly, the Legislature of Puerto Rico has declared that the Authority performs an "essential government function." *Id.* § 142.

The Authority is one of a number of Puerto Rican public corporations established by the Commonwealth as government instrumentalities.[2] The First Circuit Court of Appeals has held that two such public corporations, both of which have a "legal existence and personality separate and apart from that of the Commonwealth Government,"[3] are each entitled to immunity under the Eleventh Amendment. *Puerto Rico Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1, 12 (1st Cir. 1990) (Puerto Rico Ports Authority immune); *In re San Juan DuPont Plaza Hotel Fire Litig.*, 888 F.2d 940, 944 (1st

1. *Puerto Rico Aqueduct & Sewer Auth. v. Unión de Empleados*, 105 T.P.R. 602, 628, 105 P.R. Dec. 437 (1976) ("[T]he services rendered by the Authority have been normally rendered by the State in Puerto Rico.").

2. In Puerto Rico, the Commonwealth created three classes of government instrumentalities to undertake government public works and responsibilities. *Torres Ponce v. Jiménez*, 113 P.R. Dec. 158 (1982) (classes include government departments and agencies, public corporations, and joint stock companies under laws of private corporations).

3. P.R. Laws Ann. tit. 23, § 671a (Tourism Company of Puerto Rico); *Id.* tit. 23, § 333(a), (b) (Puerto Rico Ports Authority).

Cir. 1989) (Tourism Company of Puerto Rico immune).[4]

B. The Authority and the M&E Contract.

As the entity responsible for wastewater treatment throughout the Commonwealth, the Authority has been the defendant in a lengthy enforcement proceeding brought by the United States Environmental Protection Agency ("EPA") under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* In 1985, the Authority and EPA entered into a comprehensive consent order, which, as supplemented, required the repair and rehabilitation of 83 of the plants operated by the Authority and set forth schedules for completing the improvements. Pet. App. at A2.

In March 1986, the Authority executed a contract with Respondent, Metcalf & Eddy, Inc. ("M&E"), a private engineering firm, to assist it in complying with the consent order. *Id.* Between 1986 and 1991, M&E and its subsidiary, Metcalf & Eddy de Puerto Rico, Inc., billed the Authority approximately $180 million for the services performed under the contract.

In 1990, the Puerto Rico Infrastructure Financing Authority, an affiliate of the Government Development Bank of Puerto Rico, audited M&E's billings under its contract with the Authority. Appendix to First Circuit

4. In addition, the District Court for the District of Puerto Rico has afforded Eleventh Amendment immunity to the Puerto Rico Medical Services Administration, *Rodriguez Diaz v. Sierra Martinez*, 717 F. Supp. 27, 31 (D.P.R. 1989); the Puerto Rico Elections Commission, *Torres Torres v. Comision Estatal de Elecciones de P.R.*, 700 F. Supp. 613, 620 (D.P.R. 1988); the Recreational Development Company of Puerto Rico, *Villegas Davila v. Pascual*, 631 F. Supp. 919, 922 (D.P.R. 1986); and the Cooperative Development Administration of Puerto Rico, *Cancel v. San Juan Constr. Co.*, 387 F. Supp. 916, 919 (D.P.R. 1974). *But see Caribbean Airport Facilities, Inc. v. Puerto Rico Ports Auth.*, No. 90-2271 (D.P.R. Jan. 27, 1992) (Ports Authority not entitled to Eleventh Amendment immunity when acting solely in non-governmental, proprietary capacity).

Briefs ("1st Cir. App.") at pp. 184-280. The audit evaluated M&E's systems of internal control and concluded that M&E and its Puerto Rican subsidiary had "no internal controls in place" to prevent billing errors. *Id.* at p. 188. The audit also concluded that M&E and its subsidiary had overbilled the Authority by more than $18 million in questioned costs in 61 audited invoices. Based on its statistical sampling of invoices, the audit projected nearly $40 million in such questioned costs in the 2,219 invoices that the companies had submitted prior to the audit. *Id.* at p. 263.

The Authority sent M&E a draft of the audit report on August 10, 1990. Six weeks later M&E filed the present damages action against the Authority in the United States District Court for the District of Puerto Rico. The action invoked the federal court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1). M&E named the Authority as the sole defendant and, relying exclusively on Puerto Rican law, alleged breach of contract and damage to its business reputation. Amended Complaint (Sept. 25, 1991).

C. The Authority's Claim to Immunity.

On February 26, 1991, the Authority filed the motion that gave rise to this appeal: a motion to dismiss based on a claim of immunity from suit in federal court under the Eleventh Amendment to the United States Constitution. In its motion, the Authority argued that as an "arm of the State" of Puerto Rico, *see Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Co.*, 818 F.2d 1034, 1037 (1st Cir. 1987) ("arm of the State" test), it was shielded from M&E's Commonwealth-law claims in federal court.[5] The Authority urged M&E to refile the

5. In the decision being appealed, the First Circuit held "that Puerto Rico is to be treated as a state for Eleventh Amendment purposes." Pet. App. at A3 n.1 (citing *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983)). M&E did not ask the First Circuit or this Court to reconsider this well-settled principle. For the purposes of this case, Puerto Rico is to be treated as a State.

lawsuit in the courts of the Commonwealth of Puerto Rico, which the Authority acknowledges would have jurisdiction over the suit. 1st Cir. App. at p. 166.[6]

On May 17, 1991, the district court denied the Authority's motion to dismiss under the Eleventh Amendment. Ignoring the First Circuit's seven factor "arm of the State" test, the district court refused to dismiss the action, asserting only that the Authority has the "ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds." Pet. App. at A9.

6. In the Commonwealth courts, the proceeding would be conducted in Spanish, the native language of the vast majority of the Authority's employees and witnesses. In the District Court, the proceedings are in English, through translators if necessary. 48 U.S.C. § 864. The courts of the Commonwealth, directly familiar with the Commonwealth's civil code (not common law) antecedents and history, are the Authority's preferred tribunals to give effect to the immunities originally granted to the Authority under Commonwealth law in the Spanish language. *See, e.g.*, P.R. Laws. Ann. tit. 22, § 144(c) (Authority is immune from certain damage suits and Authority's property is immune from judicial execution and sale); *Arraiza v. Reyes*, 70 P.R.R. 583, 587, P.R. Dec. 614 (1949) (Authority's funds cannot be judicially attached if attachment interferes with Authority's "governmental functions"). *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.").

D. The Authority's Appeal of the District Court's Denial of its Claim to Eleventh Amendment Immunity.

The Authority immediately appealed the district court's order to preserve its claim to Eleventh Amendment immunity from suit in federal court.[7] On September 25, 1991, the Court of Appeals for the First Circuit dismissed the Authority's appeal for want of appellate jurisdiction without addressing the merits of the Authority's Eleventh Amendment claim. *Id.* at A8 n.6. Holding that *stare decisis* required it to follow its earlier decision in *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), the court below concluded that the Eleventh Amendment does not provide States or state entities with an entitlement not to stand trial in the federal courts. Pet. App. at A4 (citing *Libby*, 833 F.2d at 404-07).[8] Instead, the court held that the Eleventh Amendment does no more than protect state treasuries from monetary judgments, an interest that " 'can be adequately vindicated upon an appeal from a final judgment. . . .' " *Id.* at A4 (quoting *Libby*, 833 F.2d at 407). For that reason, while acknowledging that its conclusion conflicted with the decisions of other circuits, *id.* at A7 (citing four conflicting cases), the First Circuit held that interlocutory orders denying claims to Eleventh Amendment immunity from suit are not appealable as collateral final orders under *Cohen v.*

7. The Authority sought to stay the district court proceedings, but both the district court and the court of appeals denied its requests. Pet. App. at A3 n.2. The court of appeals nonetheless held that the Authority would not waive its immunity claim by further participation in the district court proceedings, including the filing of counterclaims. *Id.* at A12. M&E has acknowledged that the Authority has not waived its claim to immunity. Br. in Opp. at p. 12.

8. In the decision being appealed, the First Circuit engaged in relatively little original analysis and, holding that it was bound by the decision of the earlier panel, relied instead on the holding, reasoning, and language of *Libby*. Pet. App. at A4 ("*Libby* must shape our consideration of [the Authority's] appeal.") The Authority's argument thus addresses the rationale of *Libby*, which the First Circuit explicitly adopted in the decision being appealed. *Id.*

Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Pet. App. at A3-A4.[9]

SUMMARY OF ARGUMENT

The Eleventh Amendment protects the dignity and sovereignty of States by shielding them from involuntary submission to the jurisdiction of the federal courts. Interlocutory orders that deny claims of Eleventh Amendment immunity are immediately appealable under the *Cohen* collateral order doctrine, because such orders imperil the States' sovereign prerogative not to be compelled to submit to federal jurisdiction at the instance of private parties. Only an immediate appeal of such orders can preserve this fundamental right of the States within our federal system.

The United States Court of Appeals for the First Circuit erred in holding that orders denying claims of Eleventh Amendment immunity from suit are not appealable as collateral final orders under *Cohen*. The First Circuit's holding is based on the erroneous premise that the Eleventh Amendment only provides an immunity from monetary liability and does not shield unconsenting States from suit in the federal courts. The First Circuit's opinion is contrary to the wording of the Eleventh Amendment, the history of the Amendment, and this Court's clear statements on the significance and purpose of the Eleventh Amendment.

9. On March 12, 1992, three days after this Court granted certiorari, the district court stayed all proceedings pending appellate disposition of the Authority's claim to Eleventh Amendment immunity.

ARGUMENT

I.

ELEVENTH AMENDMENT IMMUNITY FROM SUIT, FULLY APPLICABLE IN DIVERSITY CASES, PROTECTS STATES FROM BEING FORCED TO SUBMIT TO FEDERAL JUDICIAL AUTHORITY

A. The Eleventh Amendment Broadly Shields States From Diversity Actions Commenced or Prosecuted by Individuals.

This Court has made clear that the Eleventh Amendment, both because of its explicit text and for fundamental structural reasons, broadly shields States from private actions brought in federal court:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given*.

Pennhurst, 465 U.S. at 98 (quoting *In re State of New York*, 256 U.S. 490, 497 (1921)). Most relevant to the present case, the Eleventh Amendment absolutely shields States from diversity actions. *See Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 487 (1987) (plurality opinion) ("[T]he Eleventh Amendment established 'an absolute bar' to suits by citizens of other States or foreign states.") (quoting *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934)); *Pennhurst*, 465 U.S. at 100 ("[A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.") (quoting *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 280 (1973)).[10]

The Amendment specifically was enacted in response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which this Court exercised jurisdiction over a diversity action brought against a State. "The reaction to *Chisholm* was swift and hostile." *Welch*, 483 U.S. at 484. The Eleventh Amendment bar on federal suits was immediately placed in the Constitution to restore the Framers' understanding that the federal judicial power did not allow a State "to be called to the bar of the federal court." *Id.* at 480 n.10. (noting views of Madison, Hamilton, and Marshall).[11] Accordingly, it has been recognized consistently, even by Justices who have read the Amendment narrowly, that federal courts may not entertain diversity cases – like this one – brought by individuals against States. *See Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 310 (1990) (Brennan, J., dissenting) ("[T]he Eleventh Amendment secures States only from being haled into federal court by out-of-state or foreign plaintiffs asserting state-law claims, where jurisdiction is based on diversity.").

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10. *See also Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2581 (1991) ("[A] State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention.' "); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982) ("A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity."); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) ("There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment."); *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Court need not examine "the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. . . . It is enough for us to declare its existence.").

11. As this Court explained in *Hans*, "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people." 134 U.S. at 12.

Beyond its specific origins and application to diversity cases, the Eleventh Amendment embodies a protection of state sovereignty as broad as the structural principle the Amendment reflects. It shields States from damages actions, *see, e.g., Kentucky v. Graham*, 473 U.S. 159 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974); from equitable claims, *see, e.g., Cory v. White*, 457 U.S. 85, 90-91 (1982); and from claims in admiralty, *In re State of New York*, 256 U.S. 490; *In re State of New York*, 256 U.S. 503 (1921). It applies whenever the State is the defendant, *Pugh*, 438 U.S. at 782 (per curiam), or when an instrumentality of the State is the defendant.[12] Because the Eleventh Amendment gives constitutional recognition to a principle of state sovereign immunity from the power of the federal courts that is broader than the Amendment's literal text, States are shielded from suit in federal court by their own citizens as well as by citizens of other States or of foreign nations. *Hans*, 134 U.S. 1; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

Because the immunity from suit in federal court guaranteed by the Eleventh Amendment is a *right* of the State, it may, of course, be waived. *Atascadero*, 473 U.S. at 241. Moreover, like many other constitutional principles, it is not absolute: it yields when truly necessary to accommodate certain needs of the federal system established by the Constitution, both originally and as

12. Although the Eleventh Amendment speaks in terms of "one of the United States," this Court has held that the Amendment equally shields state agencies and state instrumentalities as "arms of the State." *Feeney*, 495 U.S. at 311; *Howlett v. Rose* 110 S. Ct. 2430, 2437 (1990); *Treasure Salvors, Inc.*, 458 U.S. at 684 ("A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity.") (citation omitted). The Authority's argument, although expressed in terms of "States," applies equally to claims of Eleventh Amendment immunity asserted by instrumentalities of the States.

amended.[13] Thus, immunity is subject to congressional abrogation with respect to at least some federal-law claims,[14] and in *Ex parte Young*, 209 U.S. 123 (1908), the Court adopted the fiction that a suit against state officials is not really a suit against the State where it seeks only to vindicate federal rights and to enjoin future violations.[15]

These narrow limitations on the immunity guaranteed the States by the Eleventh Amendment do not affect the absolute immunity afforded the States from diversity actions. Indeed, the care with which the Court has circumscribed any encroachment on state immunity under the Eleventh Amendment confirms the strength, as well as the fundamental importance, of the immunity itself. Thus, any legislative waiver of immunity must be clear and express, *Atascadero*, 473 U.S. at 241, and any congressional abrogation must be textually unequivocal,

13. The inapplicability of the Eleventh Amendment to this Court's appellate jurisdiction, *McKesson Corp. v. Florida Div. of Alcoholic Beverages*, 110 S. Ct. 2238, 2245 (1990), and to suits brought by the United States or by sister States, *Welch*, 483 U.S. at 487, are necessary incidents of the federal constitutional system. *See Blatchford*, 111 S. Ct. at 2583; *Monaco*, 292 U.S. at 328-29; L. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers, Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 685 (1976).

14. For example, the Congress can abrogate the States' immunity under laws enacted pursuant to the Fourteenth Amendment, which, by limiting the States' authority, necessarily modified their preexisting Eleventh Amendment immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). This congressional power is, in turn, limited by the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332 (1979). The Court also has held that the Congress can abrogate the immunity of the States with respect to claims under laws enacted pursuant to the Commerce Clause, with a plurality reasoning that the States had ceded this authority in the plan of the Convention. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

15. As the Court explained in *Green v. Mansour*, 474 U.S. 64, 68 (1985), *Ex parte Young* adopted that fiction because otherwise there would be no way for the federal courts to ensure future State compliance with federal laws. *See also Edelman*, 415 U.S. at 668.

Dellmuth v. Muth, 491 U.S. 223, 227 (1989); *Blatchford*, 111 S. Ct. at 2584-85; *Atascadero*, 473 U.S. at 242. Similarly, the Court has refused to extend the *Ex parte Young* fiction beyond cases involving prospective relief under federal law, since the *Ex parte Young* rule concededly impairs Eleventh Amendment principles and that impairment cannot be justified beyond those cases. *Green*, 474 U.S. at 68; *Pennhurst*, 465 U.S. at 102-03; *Quern*, 440 U.S. at 337. As a result, claims for damages or other retrospective relief remain barred, *Edelman*, 415 U.S. at 668-69, as do any claims resting on state law, *Pennhurst*, 465 U.S. at 120-21, even when suits name state officials as defendants.

Where, as here, the suit is against an instrumentality of the State and is a diversity action seeking damages based solely on state law, there is no applicable limitation on Eleventh Amendment immunity from suit. Instead, the structural principle requiring state sovereign immunity from the judicial authority of the federal sovereign fully applies.

B. The Eleventh Amendment Affords a Broad Immunity From Suit in Federal Court, Not a Limited Immunity From Judgment.

The Eleventh Amendment immunity is an immunity from *being sued*, not just an immunity from entry of judgments. As this Court long ago explained, "[t]he very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers*, 123 U.S. 443, 505 (1887). Where the immunity applies, it protects against suits from their inception.

The character of the immunity is established by the clear language of the Eleventh Amendment. It declares that "[t]he judicial power" does not extend to "any suit" that is "commenced or prosecuted" against States. It limits the entire judicial power, not just the power to

enter judgments. It applies to the entire "suit," not just to the order of relief. It specifically provides protection from the time the suit is "commenced" and during the time it is "prosecuted," not just when the case comes to an end and final judgment is entered.

This Court's earliest interpretations of the Eleventh Amendment confirm that it was specifically designed to restore and guarantee the States' sovereign immunity from being sued at all in federal court. In 1798, this Court addressed the immediate question whether federal courts could continue to hear pending cases against States that were initiated prior to the ratification of the Eleventh Amendment. A unanimous Court held that these cases must be dismissed, explaining "that the amendment being constitutionally adopted, there could not be exercised *any jurisdiction*, in any case, past or future, in which a state was sued by the citizens of another state . . . ." *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), *quoted in Hans*, 134 U.S. at 11 (emphasis added). Several years later, the Court stated in rather succinct terms: "The amendment simply provides, that no suit shall be commenced or prosecuted against a state. *The state cannot be made a defendant* to *a suit brought by an individual.*" *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139 (1809) (emphasis added).

More recently, this Court consistently has confirmed the decisions in these early cases on the effect of the Eleventh Amendment. The Court repeatedly has held that the Amendment is not concerned only with money judgments, but applies as well to claims for equitable relief. *Pennhurst*, 465 U.S. at 100-01; *Cory*, 457 U.S. at 90-91. The Court has observed that the immunity bars the federal courts from even entertaining such suits. *Pennhurst*, 465 U.S. at 98, 99 n.8 ("The limitation [of the Eleventh Amendment] deprives federal courts of any jurisdiction to entertain such claims . . . .").

This view follows from the basic purpose and history of the immunity. As the Court has held since *Hans*, the

Eleventh Amendment is significant, beyond its literal text, for its confirmation of the principle that the federal judicial power is limited by the structural respect due States as separate sovereigns in the federal system. The Court observed in *Monaco*, 292 U.S. at 322-23 (quoting Federalist No. 81) that the Amendment embodies the "postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' " The immunity thus protects against "the indignity" of the federal sovereign "subjecting a State" to its judicial authority, *Ex parte Ayers*, 123 U.S. at 505, and prohibits calling a State "to the bar of the federal court" and requiring it to answer and be judged there. *Welch*, 483 U.S. at 480 n.10 (plurality opinion). It is this character of the immunity that makes it a fundamental element of the constitutional *structure*, guaranteeing the proper constitutional balance of authority between the state and federal governments. *Blatchford*, 111 S. Ct. at 2585; *Atascadero*, 473 U.S. at 238.

Indeed, the immunity's effect of barring the federal sovereign's exercise of power over the States, rather than barring particular judgments against the States, is inherent in the scope and background of the Eleventh Amendment. The immunity guaranteed by the Amendment, after all, is not an immunity from the burdens of litigation or from judicial orders and awards: the Amendment gives States no protection against such burdens or judgments when imposed by *state* courts. *See Hilton v. South Carolina*, 112 S. Ct. 560, 565 (1991); *Nevada v. Hall*, 440 U.S. 410, 420-21 (1979). Necessarily, the immunity is concerned only with *which* authority is holding the State to account; it preserves the States' freedom from compelled submission to *federal* court authority. That is why this Court has insisted that before a State can be found to have waived immunity, the waiver must specifically authorize suit in *federal* court,

not just in state court. *See Atascadero*, 473 U.S. at 241; *Feeney*, 495 U.S. at 305-06; *Pennhurst*, 465 U.S. at 99 n.9.

The immunity, in short, establishes a structural limit on the federal sovereign exercising its judicial authority over the States. While that structural limitation prohibits the federal courts from entering judgment against a State, it also prohibits the federal courts from exercising their extensive pre-judgment authority during the "commencement" and subsequent "prosecution" of suits against States.

II.
ORDERS DENYING CLAIMS OF ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT ARE IMMEDIATELY APPEALABLE AS COLLATERAL FINAL ORDERS

A district court order, though not a final judgment ending the litigation, nevertheless may be appealed under 28 U.S.C. § 1291 if it finally and conclusively determines a "claim of right separate from, and collateral to" the main action, and if the rights implicated by the order are too important to be denied review and are too independent of the action to defer appellate consideration until after trial. *Cohen*, 337 U.S. at 546. The Court has often explained the test that interlocutory orders must meet to be appealable under *Cohen*:

> To fall within the limited class of final collateral orders, an order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment."

Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

Given the nature of Eleventh Amendment immunity, it is clear that an order denying a claim of immunity from suit in federal court under the Eleventh Amendment satisfies each element of the *Cohen* test.

A. An Order Denying a Claim of Eleventh Amendment Immunity From Suit in Federal Court Effectively is Unreviewable on Appeal From a Final Judgment on the Merits.

The First Circuit's determination that it did not have jurisdiction over the Authority's interlocutory appeal turned on the third element of the *Cohen* test.[16] The First Circuit concluded that the interests underlying the Eleventh Amendment immunity of the States " 'can be adequately vindicated upon an appeal from a final judgment.' " Pet. App. at A4 (quoting *Libby*, 833 F.2d at 407). In reaching its conclusion, the court explicitly relied on its earlier view of the Eleventh Amendment as protecting only against monetary judgments, as providing an immunity critically different from the immunity from federal suit available to state officials, and as no longer providing States with a "right not to stand trial" after *Ex parte Young*. *Id*. The First Circuit's view is wrong.

1. The Eleventh Amendment is a Shield from Suit, Not Merely a Shield Against Monetary Judgments.

In the First Circuit's view, the Eleventh Amendment protects no more than the States' narrow interest in avoiding monetary judgments:

> The damage the Eleventh Amendment seeks to forestall is that of the state's fisc being subjected to a judgment for compensatory relief. Only if the state is forced to use funds from the state treasury to satisfy a compensatory judgment do the adverse consequences that the Eleventh Amendment prohibits occur.

Libby, 833 F.2d at 406.

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16. The First Circuit has declared that the third prong of the *Cohen* collateral order test should be the " 'central focus' and perhaps even the 'dispositive criterion.' " *Rodriguez v. Banco Cent.*, 790 F.2d 172, 178 (1st Cir. 1986) (quoting *In re San Juan Star Co.*, 662 F.2d 108, 112 (1st Cir. 1981)).

That view simply misapprehends the nature of the Eleventh Amendment and the protection it affords States. The Eleventh Amendment is not narrowly concerned with the practical effect of monetary judgments. It extends much more broadly to guarantee that suits may not be "commenced or prosecuted" in federal court against a State, whatever the type of relief sought by the plaintiff. It furnishes that guarantee to preserve the necessary independence of States as sovereigns from the judicial power of the federal government.

This structural guarantee of the Eleventh Amendment is thwarted, and the sovereign interests it protects are impaired, whenever a federal court exercises authority over States beyond what is necessary to decide the immunity question itself. Compelled pretrial proceedings and the conduct of a trial itself are as much an exercise of the "judicial power of the United States" as is the entry of a judgment. Involuntary subjection of States to such a process impairs the immunity as much as an adverse judgment. Indeed, to conclude otherwise would be to treat the immunity as not implicated in any case where a State ultimately prevails on the merits – a restriction wholly at odds with the character of the immunity as a restriction on suits "commenced or prosecuted" against the States in federal court.

The Eleventh Amendment thus guarantees the States a right not to stand trial or to be subjected to any proceedings in the federal courts. Of course, that right is irrevocably lost if a district court erroneously denies a claim of Eleventh Amendment immunity and compels the State to proceed through discovery, trial, and judgment before an appeal can be taken. A post-judgment appeal gives the States no way to vindicate the right to be free from the pre-judgment process.

Thus, this Court repeatedly has recognized that orders depriving a litigant of a right not to be tried are effectively unreviewable on appeal from a final judgment.

> [D]eprivation of the right not to be tried satisfies the *Coopers & Lybrand* requirement of being "effectively unreviewable on appeal from a final judgment." . . . A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur . . . .

Midland Asphalt Corp., 489 U.S. at 800-01 (citations omitted). *See also Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988). An order denying an Eleventh Amendment claim of constitutional immunity not to stand trial comes squarely within that description.

Indeed, six circuits other than the First have addressed this issue. All have held that claims to Eleventh Amendment immunity from suit are claims to an "entitlement not to stand trial" and, therefore, that orders denying such claims may be appealed immediately under *Cohen*.[17] Similarly, in a directly analogous context, every circuit that has addressed the issue under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-10, has ruled that orders denying sovereign immunity to a foreign government or its instrumentality are immediately appealable as collateral final orders under

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17. *Kroll v. Board of Trustees*, 934 F.2d 904, 906 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 377 (1991); *Chrissy F. v. Mississippi Dep't of Pub. Welfare*, 925 F.2d 844, 848-49 (5th Cir. 1991); *Corporate Risk Management Corp. v. Solomon*, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001, *4 (6th Cir. July 2, 1991), *cert. denied on other grounds sub nom. Coleman v. Corporate Risk Management Corp.*, 112 S. Ct. 1162 (1992); *Schopler v. Bliss*, 903 F.2d 1373, 1377 (11th Cir. 1990) (per curiam); *Dube v. State Univ.*, 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied*, 482 U.S. 906 (1991); *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 502-03 (2d Cir. 1990); *Loya v. Texas Dep't of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir.), *cert. denied* 493 U.S. 976 (1989); *Eng v. Coughlin*, 858 F.2d 889, 894 (2d Cir. 1988); *Minotti v.Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987).

Cohen.[18]

2. The Eleventh Amendment Grants a Right Not to Stand Trial Directly Analogous to Such Rights Already Recognized by This Court.

Because the Eleventh Amendment protects States against the federal judicial power, its guarantee gives States a right not to stand trial directly analogous to the rights not to stand trial already recognized by this Court. The Court has found such a right in three areas: Speech and Debate Clause immunity, *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979); double jeopardy immunity, *Abney v. United States*, 431 U.S. 651, 662 (1977); and immunity of state and federal government officials, *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743-44 (1982). As noted above, where the Court has found such a right, it has held that the right cannot be vindicated if appeal must await final judgment. *See Midland Asphalt Corp.*, 489 U.S. at 800-01.

The First Circuit sought to distinguish a claim of Eleventh Amendment immunity from the claims at issue in those cases. Focusing on *Mitchell*, the First Circuit reasoned that a State's interest in Eleventh Amendment immunity was critically different from the

18. *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 147 (2d Cir. 1991), *cert. granted on other grounds*, 112 S. Ct. 858 (1992); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989); *Compania Mexicana de Aviacion, S.A. v. United States District Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450-51 (6th Cir. 1988); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 816 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Reale Int'l, Inc. v. Federal Republic of Nigeria*, 647 F.2d 330, 331 & n.4 (2d Cir. 1981).

interest of a public official in asserting qualified immunity: "[T]he qualified immunity defense available to individual state actors is not, from either a conceptual or a practical standpoint, congruent with the Eleventh Amendment defense available to unconsenting states and state agencies." Pet. App. at A4.

The First Circuit's analysis simply confuses the *reason* for the right with the *nature* of the right. Here, as in *Mitchell*, 472 U.S. at 526 (and as in *Abney*, 431 U.S. at 659 and *Helstoski*, 442 U.S. at 507-08), the right at stake is a right not to stand trial. In those cases, of course, the predominant reason for the right is a concern to protect the particular defendants against litigation burdens and costs (either to avoid chilling the defendants' conduct, *Helstoski*, 442 U.S. at 507-08; *Mitchell*, 472 U.S. at 520-23, or to prevent harassment of the defendants, *Abney*, 431 U.S. at 661-62).[19] In the Eleventh Amendment context, the predominant concern instead is structural — the necessary independence of one sovereign from the judicial authority of another.[20]

19. Even in those situations, however, the rights involved by no means guarantee against *any* trial based on the defendant's conduct. A criminal defendant, for example, although protected by the Double Jeopardy clause against a second trial for the same offense, may well be subject to prosecution for a different crime based on other facts relating to the same conduct, *Blockburger v. United States*, 284 U.S. 299 (1932), or may be prosecuted by a separate sovereign in its own court, *Heath v. Alabama*, 474 U.S. 82 (1985). Similarly, the absolute or qualified immunity enjoyed by state and federal government officials in civil actions does not immunize them from criminal prosecutions based on the same conduct. *United States v. Gillock*, 445 U.S. 360, 372 (1980) (recognition of immunity from civil suits for state officials has "presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials."). Nor does immunity of state officials from section 1983 actions protect them from state-law suits based on precisely the same conduct. *See, e.g., Martinez v. California*, 444 U.S. 277 (1980).

20. Concerns with litigation burdens are present here as well, however. When a State is sued in its own courts it can control the burdens by defining the terms on which it may be sued. Suit in

But the *right* is the same in both cases – a constitutional right not to be subjected to specific federal court proceedings.

In all these cases, the very harm that the pertinent immunity is intended to prevent occurs whenever a trial goes forward against a defendant entitled to the immunity. This right cannot be vindicated fully if an appeal must await the conclusion of the federal trial, which the immunity, if given effect, would have prevented. As this Court said in *Mitchell*, "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526.

3. The Eleventh Amendment Continues to Shield States From Suit in Federal Court After *Ex Parte Young*.

In the decision being appealed, the First Circuit explicitly relied upon an earlier decision in which it held that *Ex parte Young*, 209 U.S. 123, fundamentally changed the nature of Eleventh Amendment immunity so that it no longer shields States from suit in federal court. Pet. App. at A4 (citing *Libby*, 833 F.2d at 404-07). In *Libby*, the First Circuit reasoned:

> To posit . . . that the essence of sovereign immunity is an immunity from trial itself, is to overlook the reality of the *Ex parte Young* exception to the Eleventh Amendment. . . . [B]ecause of *Ex parte Young*, a state has to "stand trial" whenever a *Young*-type case – a suit against [a state] official in his official capacity to remedy a violation of federal law – is brought against it. . . . Since the state is subjected to this not inconsiderable burden in a *Young* action, it cannot be convincingly argued

federal court makes any such control problematic at best and impossible at worst.

> that the entitlement possessed by the state under the Eleventh Amendment is an entitlement not to stand trial.

Libby, 833 F.2d at 406. But this analysis wholly misunderstands the meaning and significance of *Ex parte Young*.

Ex parte Young did not change the nature of Eleventh Amendment immunity where it applies; rather, it merely limited the circumstances where the immunity applies in the first instance. Indeed, all *Ex parte Young* did was to limit who may claim the immunity that belongs to the State. It did not alter the nature of the immunity for those defendants, like state agencies, that clearly may claim it.

The First Circuit's reasoning rests upon the simple error of confusing the question of who may qualify as the "State" for immunity purposes with the question of what effect of the immunity has for those entitled to it. Nothing in *Ex parte Young* changes the textually explicit or structurally necessary character of Eleventh Amendment immunity. When the immunity applies, it protects States against suits from the time they are "commenced."

It would be inconsistent with the basis of *Ex parte Young* to read it as limiting the nature of Eleventh Amendment immunity where that immunity exists, as in the present case. *Ex parte Young* rests on a "fiction" adopted as an exception to the States' otherwise blanket immunity from federal court jurisdiction. The fiction was necessary because of "the need to promote the supremacy of federal law." *Pennhurst*, 465 U.S. at 105; *Green*, 474 U.S. at 68. Recognizing its exceptional character and the distinctive federal needs that justify it, the Court specifically has "declined to extend the fiction of *Young*" beyond the limited circumstances where *prospective* relief is sought on the basis of a violation of *federal* law by individual state officials. *Pennhurst*, 465

U.S. at 105; *see also Quern*, 440 U.S. at 338; *Green*, 474 U.S. at 68; *Pugh*, 438 U.S. at 782.

The decision in *Ex parte Young*, therefore, cannot properly be used to constrict the protection of the Eleventh Amendment where it clearly applies – a case not brought against state officers, not invoking federal law, and not seeking any prospective relief. Thus, the narrow exception to a State's immunity from trial in the federal courts set down in *Ex parte Young* has no effect on the Authority's asserted right not to stand trial in federal Court.

B. Orders Denying Claims of Immunity Under the Eleventh Amendment Conclusively Determine the Issue Being Appealed.

When a district court denies a motion to dismiss, holding that the defendant has no Eleventh Amendment immunity, it has denied a state defendant's right not to be compelled to submit to the jurisdiction of the federal court. Unless the order denying the claim expressly leaves the question open, the order conclusively determines the claim of right being appealed. "[I]t is apparent that '*Cohen's* threshold requirement of a fully consummated decision is satisfied' " when an order denies a claim of right not to stand trial. *Mitchell*, 472 U.S. at 527 (quoting *Abney*, 431 U.S. at 659).

In this case, the district court order simply denied the Authority's motion to dismiss and left no further steps for the Authority to take to avoid compelled discovery and trial. The order conclusively determined the Eleventh Amendment immunity question.

C. Orders Denying Claims of Eleventh Amendment Immunity Resolve an Important Question Separate and Distinct From the Merits of the Action.

1. Eleventh Amendment Issues Are Separate From the Merits of the Underlying Action.

The issue whether a State is entitled to Eleventh Amendment immunity from a diversity action in federal court obviously is separate from the merits of the underlying action. A claim to Eleventh Amendment immunity in such a case depends on (1) whether the defendant is the State (or is an "arm of the State"), (2) whether its claim to Eleventh Amendment immunity was waived, and (3) whether the Congress abrogated the defendant's immunity in that case. None of these issues typically would bear any relation to the substantive issue in the case – whether particular obligations under state law have been breached.[21]

In this case, for example, whether the Authority is entitled to Eleventh Amendment immunity from suit in federal court depends on whether the Authority is an instrumentality of the Commonwealth of Puerto Rico. The answer to that question primarily depends on local statutes and decisions defining the status of the Authority and its relationship to the Commonwealth,[22] and secondarily on such factors as the source of payment of any judgment. *Ainsworth*, 818 F.2d at 1037. Those

21. In a different context, cases brought under federal law against state officials where the defendant's entitlement to Eleventh Amendment immunity may turn on the question whether the relief ultimately awarded is prospective or retrospective. In such a case, a pre-trial motion claiming immunity may not be "separate" from the merits, but the district court typically would not "conclusively determine" the immunity issue prior to judgment in any event. This, of course, is not such a case.

22. *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 339 n.6 (1986) ("A rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico.") (citing *Diaz v. Gonzalez*, 261 U.S. 102, 105-06 (1923) (Holmes, J.)).

factors have nothing to do with the issue whether the Authority's contract with M&E was breached, or the amount of damages, if any, incurred by the Authority or by M&E.

A claim to Eleventh Amendment immunity is thus much more "conceptually distinct," *Mitchell*, 472 U.S. at 527, and therefore clearly separate from the merits of the underlying action than is a claim of qualified official immunity. The latter often involves both the "plaintiff's factual allegations" and the plaintiff's legal claims since qualified immunity turns on whether the asserted legal right was clearly established. *Id.* at 529. Yet, this Court in *Mitchell* found that the claim to qualified immunity was wholly separate from the merits of the underlying action for the purpose of the *Cohen* test. *Id.* It follows, *a fortiori*, that a claim to Eleventh Amendment immunity is separate from the merits of the underlying action for the purposes of the *Cohen* test. *See id.* at 528-29 ("[T]he Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test . . . .").

2. Eleventh Amendment Rights Are Too Important to Be Denied Interlocutory Review.

In *Cohen*, the Court observed that, for an interlocutory order to be immediately appealable, the rights implicated by the order should be "too important to be denied review . . . ." *Cohen*, 337 U.S. at 546. More recently, Justice Scalia has written that "[t]he importance of the right asserted has always been a significant part of our collateral order doctrine." *Lauro Lines S.R.L.*, 490 U.S. at 501 (Scalia, J., concurring). There can be no question that the Eleventh Amendment meets this criterion.

On numerous occasions this Court has described the Eleventh Amendment's role as " 'an essential component of our constitutional structure,' " *Blatchford*, 111 S. Ct. at 2585 (quoting *Dellmuth*, 491 U.S. at 227-28).

The Court has said that the Eleventh Amendment declares a policy and sets forth a limitation on federal judicial power of "compelling force," *Ford Motor Co. v. Indiana Dep't of Treasury*, 323 U.S. 459, 467 (1945), and has stressed "that abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, placing a considerable strain on '[t]he principles of federalism that inform Eleventh Amendment doctrine.'" *Dellmuth*, 491 U.S. at 227 (quoting *Atascadero*, 473 U.S. at 238 and *Pennhurst*, 465 U.S. at 100).

The fundamental character of the immunity is reflected throughout the Court's Eleventh Amendment doctrine. It underlies the basic principle that the immunity is broader than the text of the Amendment, and the Court's insistence that the *Ex parte Young* fiction be limited to what is strictly necessary in the federal system. The importance of the immunity is reflected also in the "clear statement" rules limiting waiver or abrogation of a State's Eleventh Amendment immunity – the requirement of "an unequivocal expression" of congressional or state intent to " 'overturn the constitutionally guaranteed immunity of the several states.' " *Pennhurst*, 465 U.S. at 99 (quoting *Quern*, 440 U.S. at 342). *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 75 (1989).

Given our constitutional system, an order denying a State's right to immunity from federal court jurisdiction involves a right important enough to merit interlocutory appellate review.

CONCLUSION

The decision of the First Circuit should be reversed and the case remanded with instructions to review the merits of the Authority's appeal from the district court's denial of its claim to Eleventh Amendment immunity.

Respectfully submitted,

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